reduced are different things. The agreement is the legally significant fact, the writing is only the evidence by means of which it is proved. The application of that observation to the present case is as follows :

The plaintiff says that sometime in February, 1950, in consideration of his lending the money to the defendant she agreed to the obligation to repay the money and she gave him collateral security. That agreement and that giving of security were set out in writing in the so-called Bill of Sale of 28th February, 1950. From these facts it follows that the plaintiff cannot now set up what he calls 'an implied agreement' for two reasons. In the first place, he can only do so by giving evidence as to the circumstances from which the agreement is to be implied and the agreement having been reduced to writing such evidence is inadmissible by reason of section 91 of the Evidence Ordinance. In the second place, and this is an even more fundamental objection, even if such evidence could be admitted it would be evidence not of a different agreement from the one which was reduced to writing but of the same agreement. In other words, there was only one agreement and it is wholly immaterial that if it were not for section 91 of the Evidence Ordinance two different bodies of evidence, that is to say, the writing on the one hand and the surrounding circumstances on the other, would be available to prove it. It was for the purpose of the obligation contained in this agreement that the security was given and the effect of section 29 of the Civil Procedure Code once the security has been sued upon is to bar the plaintiff from suing on the obligation and that bar cannot depend in any way upon the nature of the evidence by which it is sought to prove the obligation. So much for any attempt on the part of the plaintiff to set up what he calls 'an implied agreement'.

I see, however, no reason why the plaintiff should not sue for money had and received. I discussed the nature of this cause of action in the case of *Mohamed Abdullah v. Teoh Teng Swee*[1] and see no reason to repeat what I said there beyond quoting the following passage from the speech of Lord Wright in the case of *Fibrosa Solka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd.*[2] where after referring to the judgment of Lord Mansfield in the case of *Moses v. Macferlan*[3] His Lordship said :—

"Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort . . . ." The gist of the action is a debt or obligation implied, or, more accurately, imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost."

The truth is that an action for money had and received has nothing in common with an action in contract. In the case of contract the obligation arises from the agreement of the parties and in the present case it was for the performance of this obligation that the security was given. In the case of an action for money had and received, the obligation is created by operation of law once certain facts which do not include agreement between the parties are established.

It follows, then, that the present proceedings can proceed in so far (but in so far only) as they are based on money had and received.

I am fortified in the result at which I have thus arrived by a consideration of the case of *Bradford Advance Co. Ltd. v. Ayers & Wife*[4]. That was a case where money had been lent on a Bill of Sale which was found to be void and Bailhache J. said :—

"At first sight it would seem that the bill of sale being void, and the covenant to pay interest being therefore void, that the liability to repay the principal had also gone. But that is not so. An action would lie for money had and received, and that action would lie apart from contract or negotiation on the facts of the case, namely, that the plaintiffs had lent the defendant £100, and in those circumstances an obligation to repay the loan arises, and that obligation carries with it an obligation to pay interest at a reasonable rate . . . ."

Paragraph 10 of the Plaint will be struck out and as regards costs, the cost of the proceedings on 24th November, 1953, and to-day will be treated as costs in the cause.

Order accordingly.

ABDULLAH v. REGINA

[C. C.A. (Murray-Aynsley C.J., Pretheroe Ag. C.J. (F.M.) & Whitton J.) September 3, 1954]

[Singapore — Criminal Appeal No. 9 of 1954]

Penal Code, s. 376 — Rape — Girl under age of 14 — Whether a bona fide mistake of fact under s. 79 of the Penal Code is a defence.

The appellant was charged with rape under s. 376 of the Penal Code. There was ample evidence that he had carnal knowledge of the complainant and that her age was under 14. The appellant contended however that he thought she was over 16. At the trial the learned Judge ruled that this belief, if it existed, was immaterial and refused to leave the matter to the consideration of the jury. He was convicted and he appealed to the Court of Criminal Appeal on the point of law that he had reasonable grounds for believing, and did in fact believe that the girl was more than 14 years of age and that he was therefore entitled to be acquitted under s. 79 of the Penal Code.

Section 79 reads: "Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a

mistake of law in good faith believes himself to be justified by law in doing it."

Held, *per* Murray-Aynsley C.J. with Whitton J. concurring: if the act would have been a tort though not an offence, he would not have been "justified by law." On the other hand, in the present case, if his belief had been correct he would have committed neither a crime nor a tort. Such an act is always "justifiable by law."

Per Pretheroe Ag. C.J. (F.M.) dissenting: where in fact the girl is under 14 it was immaterial in law whether her consent had been given because on account of her age she was incapable of giving consent.

Case referred to :—

(1) *Mohiuddin v. Emperor* A.I.R. 1930 Cal. 437 at p. 441.

COURT OF CRIMINAL APPEAL.

A. P. Godwin for the appellant.

T. A. Mahony (Crown Counsel) for the respondent.

Cur. Adv. Vult.

Murray-Aynsley C.J. (with whom **Whitton J.** agreed) : — This case turns on the construction of section 79 of the Penal Code. The appellant was charged with rape. It was clear at the trial that the offence, if committed, was only within the scope of section 376 by reason of the fact that the complainant was under 14 years of age. There was no doubt that the appellant had carnal knowledge of the complainant and that her age was under 14. The appellant contended that he thought she was over 16. At the trial the learned Judge ruled that this belief, if it existed, was immaterial and refused to leave the matter to the consideration of the jury. He was convicted and now appeals on this point of law.

There is no equivalent to section 79 in English law. This section applies to all offences whether under the Penal Code or otherwise (section 40 P.C.). It is clear that if the appellant believed "in good faith" that the complainant was over 16 it would be a case of mistake of fact. In this case what he did would not be an offence had the facts been as he supposed them to be; would he be "justified by law"? If on this supposition he would have committed some other offence, e.g., if he had thought the girl to be over 14 but under 16, he would clearly not have been justified by law. I think that if the act would have been a tort though not an offence, he would not have been "justified by law'. On the other hand, in the present case, if his belief had been correct he would have committed neither a crime nor a tort. Is such an act always "justifiable by law"? In my opinion this is so. According to modern ideas, as embodied in the Penal Code, an act only acquires its criminal character by being forbidden by law. What the law does not forbid it allows, and what a law allows is I think justified by law. I do not think that it is possible to have an intermediate area that is not forbidden but not justifiable. I think that the question should have been left to the jury and I should order a new trial.

Pretheroe Ag. C.J. (F.M.) : — In this case the appellant was convicted of the offence of rape. At his trial he admitted that he had intercourse with the female concerned and there was ample evidence to go to the jury that she was under the age of fourteen years at the time of the alleged offence. The jury found that sexual intercourse had taken place as alleged in the charge and that the girl was at the time under the age of fourteen years. Following a direction given by the learned trial Judge, they therefore brought in a verdict of guilty and the appellant was sentenced to 2 years rigorous imprisonment.

At the trial counsel for the defence had submitted that the accused had reasonable grounds for believing, and did in fact believe, that the girl was more than fourteen years of age and that he was therefore entitled to be acquitted under section 79 of the Penal Code. In his summing up the learned trial Judge, referring to this submission, said :—

"I must direct you, Gentlemen of the Jury, as a matter of law, that that is not a defence which is open to the accused in this case, and it is not therefore a matter which you can consider."

The first ground of appeal is that that was a misdirection. The second ground of appeal is that the learned trial Judge should have left it to the Jury to decide whether the appellant had reasonable grounds for believing, and did in fact believe, that the female was over the age of fourteen years.

In arguing the appeal Counsel submitted that appellant was "justified by law" because he believed "in good faith" that the girl was over fourteen years of age. By reason of the view I have formed it is not necessary for me to consider this submission in detail. Section 375 of the Penal Code is a definition section and the sentence "with or without her consent, when she is under fourteen years years of age" is part of the definition and consequently a provision of law. Mistakes of law are specifically excluded from the operation of section 79 of the Penal Code.

I am fortified in this opinion by certain provisions contained in section 300 of the Penal Code. The fifth exception to the definition in that section provides :—

"Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent."

Then follows this explanation :—

"A., by instigation, voluntarily causes Z., a person under eighteen years of age, to commit suicide. Here,

on account of Z's youth, he was incapable of giving consent to his own death. A. has therefore abetted murder."

Likewise in this appeal I am of the opinion that the girl was "incapable of giving her consent" and that the appellant was therefore guilty of rape.

It seems that this construction must have always been adopted in India because I have been unable to trace a single case where a submission similar to that made in this appeal has been made there. I have no doubt whatever that the Advocates in India would not have been reticent to advance such a submission if they had believed that it had any chance of success.

As far as I have been able to ascertain, all commentators on the Indian Penal Code express the emphatic view that intercourse with a girl under the age of fourteen years (subject only to the provisions of the exception) is rape in any circumstances. Thus, *Gour* in his Penal Code of India (at para. 4292 of the 5th Edition) states :—

"The clause simply declares that an act even though committed with the consent of a child then under fourteen years of age would be rape, her consent and precocity being both immaterial. The fact that such a girl can discriminate between right and wrong and had invited the accused to the act are both wholly irrelevant, for the policy of the law is to protect children of such immature age against sexual intercourse."

I can find no direct authority on the point under present consideration, but Ghose J., in *Mohiuddin v. Emperor*[1], approaches it very closely. In his judgment in that case he said :—

"On the charge (sic) under ss. 366 and 376 as indicated above the question of Sovana's age was very relevant. If in fact Sovana was less than 14 years of age although she had been love smitten and could write the letters referred to above, her consent to the acts referred to in ss. 366 and 376, Indian Penal Code, was in law immaterial."

The words to which I invite attention are "if in fact" and "was *in law* immaterial."

For the reason stated earlier in this judgment, I am of opinion that the direction of the learned trial Judge was correct and consequently I would dismiss this appeal.

New trial ordered.

Solicitors for the appellant: *Donaldson & Burkinshaw.*

SONG KIM PUAH v. LIM HOE CHYE

[O. C. J. (Brown J.) January 28, 1953]

[Singapore — Suit No. 326 of 1951]

Landlord and tenant — Surrender of tenancy — Verbal agreement — Absence of act inconsistent with the continuance of tenancy — Grant of licence to former tenant.

Costs — Issue which could have been tried in District Court raised in High Court — Proper order as to costs.

The defendant in this case, by an oral agreement in 1942, granted to the plaintiff a month-to-month tenancy of premises in Geylang Road. In 1951 the plaintiff agreed verbally to quit the premises if defendant's wife would withdraw criminal proceedings against plaintiff's son-in-law. The plaintiff however continued to occupy the premises and the defendant by acts of annoyance such as cutting off the electricity endeavoured to force him to leave. The rent continued to be paid as before. The plaintiff claimed, inter alia, a declaration that he was the tenant of the defendant. The defendant replied that the plaintiff had surrendered his tenancy in 1951 and thereafter stayed on as a licensee.

Held: in the absence of writing, and of any evidence of some act which was inconsistent with the continuance of the tenancy, verbal agreement to leave does not constitute delivering up of possession.

The issue of possession which could have been tried in the District Court was raised by the plaintiff in the High Court. This issue might never have been the subject of litigation. The question of whether the plaintiff was a tenant had been raised in the correspondence, and his claim for a declaration had been contested in the High Court. In a letter written when negotiations for a settlement were going on, the plaintiff's solicitors suggested to the defendant's solicitors that it would be open to them to remit the proceedings to the District Court for the trial of the possession issue and that the costs so far incurred in the High Court should follow the event in the District Court.

Held: the proper order was that he should have the costs of the possession issue on the District Court scale.

Cases referred to :—

(1) *Oastler v. Henderson* (1877) 46 L.J. Q.B. 607.

(2) *Foster v. Robinson* (1950) 2 All E.R. 342.

SUIT for a declaration in tenancy.

N. L. Macassey for the plaintiff.

L. A. J. Smith for the defendant.

Cur. Adv. Vult.

Brown J. : — Apart from the question of costs, the sole remaining issue in this case is whether the plaintiff is still the defendant's tenant or whether he surrendered his tenancy outside the Fourth Police Court on 18th October, 1950, and thereafter stayed on as a licensee. I accept the evidence of Mr. Tsan, who on that day was acting on behalf of the defendant's wife as complainant in the assault proceedings. He says that he agreed to withdraw the charge if Song Kim Puah, the present plaintiff, would give his client, the present defendant's wife, notice that he would quit the premises at once.

"Thereupon Song Kim Puah give his notice to the lady and her husband then and there".

The question is whether that operated as a surrender of the tenancy. Mr. Smith, on behalf of the defendant, contends that what occurred on that